Keow one of the deceased's widows. He says that the deceased told him that after the plaintiff had left Menglembu he had divorced her. "Word used was *'lie fan'* a technical word meaning dissolution of marriage", and later he says "I asked him 'why *lie fan*?' Deceased said because she wanted to live in Ipoh and refused to live in Menglembu".

Then there is the statement made by the deceased before the Protector of Chinese on the 3rd June, 1938, when he was trying to get his children back. The statement commences "Ng Yoon Thai (the plaintiff) was until she left me in March, 1936, my fourth wife" and towards the end of the statement (p. 102 of the record) he says:

> "She wanted to live away from the house, i.e., she wanted me to provide a separate place of abode for her and separate maintenance. I declined to agree and she wanted separation to which I agreed".

Now I think it is quite certain that "separation" does not mean separation of the character of a judicial separation under the Divorce Acts. There is no such status by Chinese custom. "Separation" in this context can only mean severance of the marital relation and is equivalent to divorce.

It is now necessary to consider how the learned trial Judge deals with this positive evidence. He rejects the evidence of Loh Mook Lim in a paragraph (p. 126 of the record) which is somewhat *obscure*. I take it, however, that he considered that the evidence of Loh Mook Lim must be prejudiced because he was the father of one of the widows, the fifth defendant. He disregards the evidence of You Kam because the statement made to him by the deceased was apparently in answer to a question and not volunteered and was ambiguous in character. He gives no ground, however, for doubting the truth of You Kam's evidence and if that can be accepted there is no reason for doubting the evidence of Loh Mook Lim. The learned Judge does not refer to the evidence of Sahat and Low Choon Sang, although in my view, their evidence is strongly corroborative of the other two witnesses. Lastly the learned trial Judge explains away the statement made before the Protector of Chinese on the ground that the deceased would be reluctant to admit that a woman who was a prostitute was his wife. I cannot think that this reasoning is sound. It is to my mind quite unthinkable that a Chinese, having information that a wife had become a prostitute, did not immediately take steps to sever the marital relation. The only possible explanation for his not doing so in 1937 or 1938, when he discovered that his wife was "earning money", must be that he had already done so in 1936, and when he says that the plaintiff was his fourth wife until she left him in March, 1936, he definitely implies that after that she ceased to be his wife. I do not think that the fact that the two detectives, in recording the deceased's conversation, make him refer to the plaintiff as "his wife" has any significance. It was merely a convenient way of indicating the woman to whom he was referring.

My conclusion, therefore, is that there is sufficient evidence that the deceased severed his relations with his wife, that is to say, divorced her according to Chinese custom, when she refused to return to him in March, 1936, and that he informed various friends and relations that he had done so, that the fact of such severance was fully recognized by the plaintiff by her conduct, and that this is sufficient to constitute a divorce of a secondary wife according to the custom among Chinese recognized in Perak.

I would accordingly allow the appeal and set aside the order made in the Court below except as to the costs of the defendants, and costs paid to the plaintiff in the Court below should be repaid. The plaintiff-respondent should pay the costs of the appeal but the defendant-appellants should have recourse against the estate for their costs as between solicitor and client. The deposit should be repaid to the appellants or their solicitor. There will be a certificate for two counsel.

Appeal allowed, certificate for two counsel.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

May 31, 1940.

LEE YEW AND 46 OTHERS

(Appellants)

vs.

PUBLIC PROSECUTOR

(Respondent).

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 9 of 1940]

Common Gaming Houses Enactment—Social Club —Habitually used for gaming, the club deriving a large part of its revenue from gaming—not gaming house— Revisionary powers of Judge exercised.

A Chinese club at Kuala Lipis was raided by the police and they found in one room a game of Mah Jong in progress and also that a game similar to dominoes (Tien Kau) was being played before their arrival; a game of billiards was also in progress. The evidence

showed that the club provided facilities for gambling and that a large part of the revenue of the club was got from the proceeds of such gaming. The majority of the appellants were convicted under S. 6 (1) of the Common Gaming Houses Enactment. They had no right of appeal and in their case the Judge could only exercise his revisionary powers. The remaining appellants were convicted under S. 4 (1) (c) of the same Enactment. On appeal,

Held, that the club was not a Common gaming house and therefore that the convictions must be set aside.

Cases referred to:—

(1) *Rex v. Fong Chong Cheng and others,* 1930 S.S.L.R. 1939.

(2) *Rex v. Lee Kim Poat and another,* 1933 S.S. L.R. 129, 2 M.L.J. 164.

Roland Braddell for the appellants.

A. J. Grattan-Bellew for the Public Prosecutor.

Poyser, C.J.—The majority of the appellants in this appeal, it is unnecessary to set out their names, were convicted under Section 6 (i) of the Common Gaming House Enactment (Cap. 47) and each fined $10.00. They have no right of appeal, but I intimated to Mr. Braddell who appeared for all the appellants and to Mr. Gratten-Bellew who represented the Public Prosecutor, that if I considered the convictions were wrong, I would exercise my revisionary powers. The remaining appellants were convicted under Section 4 (i) (c) of the Enactment and were fined $50.00 each.

The facts are as follows:

On the 29th of February 1940 the police raided the premises of the Chinese Club at Kuala Lipis, and found in one room a game of Mah Jong in progress and also evidence that a game similar to dominoes (Tien Kau) was being played before their arrival; a game of billiards was also in progress. Thirty-nine persons were present on the premises, of whom the majority were either members or visiting members. The remainder were club servants or persons who had gone to the club, not for gambling, but for some special purpose, e.g. a food hawker who was in the habit of supplying the members with light refreshments, a lady who had come to fetch her husband, and a man who was there to obtain a registration card (a certain amount of what may be called consular-agency work was carried on by members of the club). The club had bedrooms for the use of members, a billiard room, a band and a volley ball court, and provided newspapers. It also had a benevolent fund.

The club elected office-bearers annually, and submitted its accounts to the Protector of Chinese. In such accounts appeared the revenue derived from Mah Jong, and other games. It appears from Exhibit B 12 that in 1938 the Assistant Protector of Chinese drew the attention of the police to the fact that gambling was presumbly going on in Chinese Societies, but the police considered such gambling to be harmless, and also stated that details of card-accounts were satisfactorily supplied on request. Mr. Braddell argued that the evidence showed that this club was the ordinary Chinese social club, and that although gambling went on, as it did in all clubs, it was not primarily a gambling club as the prosecution maintained.

There is no doubt that the club derived a large part of its revenue from Mah Jong and other gaming fees. In the 1938 accounts, subscription and entrance fees totalled $454.70, while Mah Jong fees were $568.89. On the other hand, billiard fees were $703.85. Donations formed the principal revenue of the club for 1938, $2,435.50, but it was admitted that such donations included a tax on Tien Kau, viz. 10 per cent on winnings.

In the 1939 accounts is included a sum of $1,766.20 as special donations, and the Secretary of the club in his evidence stated that, of that amount, about $700.00 would be in respect of tax on Tien Kau. For that year Mah Jong fees were $1,246.60, while billiards brought in $721.50.

The expenses of the club, therefore, were chiefly met from donations and the fees or taxes on gaming. According to the evidence, members are asked to make donations to the club when it is in financial difficulties, but if it is not, the tax on Tien Kau appears not to be collected. The Secretary stated that in October 1939 there was no tax on Tien Kau.

As regards the law, the definition of 'common gaming house' and "gaming" is as follows. Identical definitions occur in the Colony Ordinance.

> 'Common gaming house' includes any place kept or used for gaming to which the public or any class of the public has or may have access and any places kept for habitual gaming, whether the public or any class of the public has or may have access thereto or not, and any place kept or used for the purpose of a public lottery".
>
> 'Gaming' with its grammatical variations and cognate expressions means the playing of any game of chance or of mixed chance and skill for money or money's worth".

The law in the Colony is now well settled.

I would cite the following passages from the judgment of Stevens, J. in the case of *Rex v. Fong*

Chong Cheng & Others,[1] page 139, at pages 145 and 148 respectively:—

> "It has first to be observed that in this Colony it is not illegal to play games of chance for money. But it is illegal to keep a Common gaming house or to game in it, and common gaming house is either a place to which the general public are able to resort for the purpose of gaming, or a place which, though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming. I say 'primarily' because I think it is clear that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble. Nor in my opinion do the premises of an ordinary social club provides facilities for its members to gamble, and some of them habitually use the premises for that purpose".

> "It would be a most lamentable thing if the administration of our law were to give rise to the idea that indulgence in games of chance for money stakes, a common social amusement, notoriously practised by all classes of the community, becomes penal if practised by a Chinese night club. The real question in issue was whether the premises raided on this occasion were devoted exclusively to gambling or to general social purposes among which games of chance were included; and in my opinion the latter proposition is the natural inference to be drawn from the evidence".

This decision was approved by the Court of Appeal in the case of *Rex v. Lee Kim Poat & Another,*[2]. I would refer to the following passage in the judgment of Murison, C.J. (Page 134):—

> "This modified construction of the application of the Ordinance relating to gaming and betting thus has the authority of Stevens, J. in this Colony and of several Judges in England. It is further consistent with common sense; for without such modification we are left in this position that three quarters of the adult population of Singapore are unprosecuted criminals and in future no man could play old-maid with his own wife in his own house for a ten-cent stake without committing a criminal offence".

The correctness of these decisions has not been subsequently questioned in the Colony, and I consider that although I am not strictly bound by a decision of the Colony Court of Appeal, I should, in the absence of exceptional circumstances follow such decision.

Mr. Braddell argued that English decisions were of no assistance. I entirely agree with him, for English law on the subject is different, and to quote Lord Halsbury in *Knowles & Sons v. Lancashire & Yorkshire Railway Co.,* 14 A.C. page 248, at page 253:—

> "I do not think one gets any help from the construction of other Statutes passed at different times and in pursuance of different lines of thought".

The point, therefore, I have to decide is whether the facts in this case justify holding that this club was primarily or exclusively a gambling club. In my opinion they do not. In fact there is far more evidence in this case that the club was a *bona fide* social club than there was in *Fong Chong Cheng's*[1] case. The fact that some of the members of the club may have thought that in playing Tien Kau they were doing something unlawful, although it may put the onus on the defence to prove that the club was not a gaming house, does not prove that they were in fact doing anything unlawful; and the evidence as a whole in my opinion, applying the principles laid down by Stevens, J., did prove that this club was not a common gaming house.

In regard to the Magistrate's second ground of decision (page 29 of record) that a major part of the revenue of the club was derived from gambling, I would again refer to the judgment of Stevens, J. Habitual gaming was no doubt carried on in the Club, but it is common knowledge that it is habitually carried on in most clubs, and if a club chooses to derive a large part of its revenue from gaming, rather than as Mr. Braddell said from the sale of liquor, it does not necessarily become a common gaming house.

The appeals are accordingly allowed, and the convictions set aside. Acting in revision, I make a similar order in respect of these appellants who have no right of appeal. The fines paid will be refunded.

Order Accordingly.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 23, 1940.

IN THE MATTER OF THE ESTATE AND EFFECTS OF TIMAH BINTI ABDULLAH, DECEASED.

THE OFFICIAL ADMINISTRATOR, F.M.S.

(Plaintiff)

vs.

1. MAGARI MOHIHIKO
2. HAYASHI TOSE
3. UDAH BINTI BAKAR
4. STATE OF PAHANG

(Defendants).

Muhammadan Law—whether the rule that Non-Muhammadans are excluded from inheriting in accordance with Muhammadan Law applies in the